Supreme Court, U.S.
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No. 00-602

IN THE
SUPREME COURT OF THE UNITED STATES

GENERAL COMMUNICATION, INC.,

Petitioner,

v.

IOWA UTILITIES BOARD, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF OF PETITIONER GENERAL COMMUNICATION, INC.

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Petitioner AT&T and the United States both support GCI's petition for a writ of certiorari on the issue whether the Eighth Circuit wrongly invalidated the FCC's Rule 405, which implements the rural exemption and suspension provisions in Section 251(f) of the Act. The United States Telecom Association and the Rural Telephone Coalition (collectively the "USTA"), however, have opposed GCI's petition, even while acknowledging that the Eighth Circuit's decision merits review on other issues. Each of the USTA's stated reasons for excluding the issues raised in GCI's petition from this Court's review of the decision is meritless.

I. THE RURAL EXEMPTION ISSUES MERIT REVIEW BY THIS COURT

The USTA's principal argument in urging denial of GCI's request for review of the rural exemption issues is that the government's failure to seek certiorari on these issues indicates that the issues "do not rise to the level of national importance that warrants this Court's review." Opp. Br. at 10. The government's response to GCI's and AT&T's petitions on the rural/small LEC issues entirely negates the USTA's position. The Solicitor General has now made clear that the Federal Communications Commission views these issues to be of "considerable importance." Gov't Br. at 20. The government agrees with GCI that the Eighth Circuit's "plainly wrong" analysis, *id.* at 18, could "significantly impede the development of local competition in many rural areas." *Id.* at 17. The Solicitor General not only believes that review by this Court would be "appropriate[]" under this Court's standards for exercising certiorari jurisdiction, *id.* at 9; he has taken the position that "it would be particularly constructive for the Court to review" the questions GCI has presented. *Id.* at 20.

The USTA is also incorrect to suggest that the issues raised in GCI's petition are not "in any way intertwined with other questions presented in the [various] parties' petitions

for certiorari." Opp. Br. at 10. All parties apparently agree that this Court should review the questions involving the interpretation of duties imposed on carriers in Section 251(c) of the Communications Act – issues that the government has described as having "immense significance for the telecommunications industry" and on which review by this Court is "urgently needed." Gov't Br. at 20. GCI seeks review of the exemption and suspension provisions in subsection (f) of the same Section 251. The issues presented by GCI will determine the standards under which rural and small incumbent carriers may be excused from the "immensely significant" requirements of Section 251(c). The scope of the duties imposed on incumbent carriers is fairly characterized as intertwined with the standards under which some incumbent carriers may escape those duties.

That GCI has not identified a circuit split on these precise issues does not diminish the need for this Court's intervention. The Eighth Circuit did violence to the plain language of this important statute, and along the way, contorted a number of important principles of administrative law and judicial review. In articulating the three bases for invalidating FCC Rule 405, the Eighth Circuit disregarded this Court's guidance with respect to (1) the deference due to an agency's interpretation of an a statute where Congress has delegated to the agency the task of explaining ambiguous statutory terms; (2) the deference due to an agency in interpreting the meaning and scope of its own regulations; and (3) the proper interpretive methods in ascertaining when the meaning of a statute is plain on its face.

If this Court grants certiorari on the various pricing issues that all parties agree merit review, the additional burden of reviewing discrete statutory questions arising from the same section of the Act would be comparatively small.[1]

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[1] Although this reply focuses upon the first two questions presented by GCI, we note that this Court, if it grants certiorari on those issues,

The issues involve a straightforward analysis concerning whether the statute's plain language forecloses the FCC's regulatory interpretation, and if not, whether the FCC's interpretation is reasonable. The minimal incremental burden on the Court should be accepted to ensure that the vital interests of rural Americans are protected to the same extent as the interests of urban citizens. *See* Gov't Br. at 20-21 (stating that the FCC is "concerned that . . . the Eighth Circuit's erroneous rulings concerning Section 251(f) could be construed to leave much of 'rural and small town America' without the primary benefits of Section 251, a result that Congress plainly did not intend").

II. THE EIGHTH CIRCUIT INCORRECTLY REJECTED THE FCC'S INTERPRETATION OF "UNDUE ECONOMIC BURDEN"

The USTA nowhere contests the basic proposition that Congress delegated to the FCC the task of defining what the term "undue economic burden" means in practice. In Rule 405, the FCC concluded that an economic burden that is no greater than that which is inherently part of efficient economic competition is not undue – a conclusion that plainly reflects an appropriate exercise of the agency's discretion in light of the purpose of the statutory scheme.

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should logically grant review of the third question as one intertwined with them. The FCC has made clear in public statements that Rule 405 does not require proof of undue economic burden in every case seeking to continue an exemption or obtain a suspension. GCI Pet. at 26. The Eighth Circuit strained to interpret the regulation to the contrary. To deny review on the third question presented would force the FCC to undergo costly and time-consuming rulemaking to reissue a regulation simply to clarify further what is already clear from the face of the rule and subsequent FCC interpretations. Review of the third question together with the first and second would resolve all issues as to the legitimacy of the FCC's regulation and avoid more pointless and burdensome administrative proceedings.

The USTA, like the Eighth Circuit, misreads FCC's Rule 405 by contending that it "excluded consideration of certain types of economic burdens – those associated with efficient competitive entry . . .," and argues that such interpretation is unreasonable. Opp. Br. at 13. But the regulation does not exclude consideration of anything. Instead, as the government observes, it provides that "a carrier must demonstrate some economic burden 'beyond' – *i.e.*, in addition to – an 'economic burden that is typically associated with efficient competitive entry.'" Gov't Br. at 16. Thus, the USTA, like the Eighth Circuit, has "attacked a straw man." *Id.* at 16.

As the government further points out, if the Eighth Circuit truly meant to invalidate the approach the FCC actually took in the regulation, "it could significantly impede the development of local competition in many rural areas, because the introduction of competition inherently imposes an economic burden on a monopolist." Gov't Br. at 16-17.[2] The USTA brief itself demonstrates that existing rural monopolies will interpret the decision in precisely that way: it contends that the result of the Eighth Circuit's decision will be to permit rural monopolies to avoid competition even when the only economic burden they can demonstrate is that associated with efficient competitive entry into the marketplace. *See* Opp. Br. at 11-12. That is exactly what the FCC legitimately sought to prevent.

The USTA cites several other portions of the 1996 Act for the purpose of showing that the statute gave "the State Commissions regulating local telephone service the tools to prevent unchecked competition in rural markets." Opp. Br. at 4. Whatever "unchecked competition" is supposed to mean, the fact is that none of these other statutory provisions

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[2] Thus, USTA's contention that the FCC does not share GCI's view that the Eighth Circuit's decision will deter the development of competition in rural areas is incorrect. *See also* Gov't Br. at 19.

authorizes the state commissions to bar entry of a new competitor merely because of the desire of the local monopolist to avoid the ordinary competitive injuries that would be associated with the new entrant. Instead, these provisions are intended to prevent "cream-skimming" by new entrants, *not* by barring competitive entry, but instead by permitting the state to impose on new entrants the duty to provide universal service throughout the market. *See* 47 U.S.C. § 253(f). Similarly, the statute protects universal service in rural areas by prohibiting a new entrant into a rural market currently served by only one company from receiving universal service payments unless the state commission enters an express finding that it would serve the public interest to do so. 47 U.S.C. § 214(e)(2). In neither case does the statute prohibit competitive entry into the market. The legislative history materials quoted by the USTA (Opp. Br. at 5 n.3) demonstrate that the exemption/waiver/modification provisions of the 1996 Act were likewise never intended as an escape hatch for the incumbent rural monopolist seeking to avoid the economic burdens associated with efficient competitive entry.[3]

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[3] USTA quotes a portion of a sentence in a Senate Report relating to in an earlier version of the 1996 Act, while omitting that portion of the sentence which states the intent of the Senate Committee that waiver or modification of the affirmative duties under the Act had to be "with the protection of consumers and allowing for competition." The full sentence reads:

> *The committee intends that the FCC or a state shall, consistent with the protection of consumers and allowing for competition,* use this authority to provide a level playing field, particularly when a company or carrier to which this subsection applies faces competition from a telecommunications carrier that is a large global or nationwide entity that has financial or technological resources that are significantly greater than the resources of the company or carrier.

S. Rep. No. 104-23 at 22 (1995) (emphasis added); *compare* Opp. Br. at 5 n.3 (italicized portion of quote omitted by the USTA).

Nor may citizen-consumers who live in the rural areas of the country take comfort from the USTA's position that even if a rural LEC is relieved of its § 251(c) affirmative duties to make its facilities available to a new competitor, outside companies will still be willing to compete in the market through the use of their own facilities. Opp. Br. at 11. As this Court has recognized, the Section 251(c) duties were "foremost" in promoting the competitive goals of the Act. *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 726 (1999). Without Section 251(c), market entrants generally will not be cost- or service-competitive with the local monopolist, thus depriving rural citizens of competitive prices and improved services that the USTA admits are part of the purpose of the Act. *See id.* at 3-4. *See also* AT&T Reply Brief.

Finally, while Congress may have "entrusted the adjudicatorial responsibility for conducting [exemption/ suspension/modification] proceedings to the State Commissions" (Opp. Br. at 12), Congress at the same time authorized the FCC's "issuance of rules to guide the state commission judgments." *AT&T Corp.*, 119 S. Ct. at 733. The FCC recognized in its First Report and Order that "the state commissions have the sole authority to make determinations under section 251(f)" and stated that "for the most part ... we expect that states will interpret the requirements of § 251(f) through rulemaking and adjudicative proceedings." Pet. App. at 63a and 64a. The FCC issued only a single regulation designed to assure that existing rural monopolies are not shielded from the ordinary economic consequences of competition, and that the burden of proof be allocated to the party in these types of proceedings having control of the evidence. Under traditional *Chevron* standards for judicial deference to administrative rulemaking, the regulation should have been affirmed as completely consistent with the 1996 Act, especially in view of this Court's observation that Congress was "well aware that the ambiguities it c[h]oses to produce in

a statute will be resolved by the implementing agency" and that the Congress in this instance chose to adopt a statute which is "a model of ambiguity or indeed even self-contradiction." *AT&T Corp.*, 119 S. Ct. at 738.

III. THE EIGHTH CIRCUIT'S "PLAIN LANGUAGE" ANALYSIS OF THE BURDEN OF PROOF ISSUE IS WRONG, EVEN ACCORDING TO THE USTA

Although the USTA purports to agree with the conclusion that the "plain meaning" of the Act *requires* that competitive LECs challenging a rural exemption bear the burden of proof (Opp. Br. at 15), it implicitly disclaims the analysis of the Eighth Circuit. It bases its agreement upon an interpretation of statutory language that was advanced by the USTA below, but apparently was rejected by the Eighth Circuit as a basis for its conclusion that the plain language dictated the result reached. Aside from the USTA's complete failure to defend the correctness of the Eighth Circuit's substitute rationale, its position independently lacks legal merit because the statutory language on which it relies does not foreclose the FCC's position in Rule 405.

The Eighth Circuit looked only to Section 251(f)(1) of the Act to determine on whom, if anyone, the Act imposed the burden of proof in exemption termination proceedings. In concluding that the Act definitively imposed the burden of proof upon the party seeking to lift a continuing exemption, the court relied upon two, and only two, features of the statute. *First*, it cited "[t]he use of the word 'until,'" in the statute's directive that "the requirements of § 251(c) 'shall not apply to a rural telephone company *until*' a request has been made." Pet. App. 31a (quoting 47 U.S.C. § 251(f)(1)(A)) (emphasis added by Eighth Circuit). *Second*, it pointed to the statute's use of the word "terminate" rather than "grant" in Section 251(f)(1)(B). Taken together, the words "until" and "terminate" led the Eighth Circuit to conclude that "the plain meaning of the statute" foreclosed

the placement of the burden of proof on the incumbent rural LEC seeking to continue its exemption from the Act's requirements. Pet. App. 31a-32a.

The USTA agrees with the Eighth Circuit's conclusion, but nowhere mentions the words "until" or "terminate" as a basis for its agreement and does not contest our assertion that the court's rationale is a non sequitur. *See* GCI Pet. at 14-15. Instead, it turns to a different subsection altogether – subsection 251(f)(2), describing suspension proceedings – to offer "direct support in the language and structure of the Act" for the decision below. Opp. Br. at 15. The USTA argues that semantic differences in the required findings by the state commissions in Section 251(f)(1) and 251(f)(2) clearly reflect a different allocation in the burden of proof. The USTA contends that subsection (f)(1)'s required finding that a request for interconnection "*is not* unduly economically burdensome" places the burden of proof on the party requesting that the exemption be lifted, whereas subsection (f)(2)'s required finding that suspension "is necessary to avoid imposing a requirement that *is* unduly economically burdensome" places the burden of proof on the party requesting the suspension. Opp. Br. at 15.

But the decision of Congress to use "is not" in one subsection, while using "is" in another, is hardly a beacon of unequivocal language placing the burden of proof on one party versus another.[4] Both of those subsections are placing a duty on the *state commission* to make particular findings, and do not speak directly to the duty of any particular party to proffer evidence or to prove its position. At best, the use

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[4] USTA's citation of *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) does not help its position. (Opp. at 16.) In *Sutton*, unlike here, the Court pointed to specific statutory language indicating that the ADA was designed to cover 46 million disabled Americans – language that was facially inconsistent with the petitioner's legal position, which would have required the ADA to cover at least 160 million Americans.

of the term "is" or "is not" is ambiguous regarding the allocation of the burden of proof. Thus, the USTA's rationale is just as inconsistent as the Eighth Circuit's with *Chevron*'s requirement that courts review agency interpretations of ambiguous statutory language by considering whether the position of the agency is plausible. *See* GCI Pet. at 20-21.

The USTA's invocation of the Administrative Procedure Act, Opp. Br. at 16, is a red herring. The USTA admits, as it must, that the APA does not apply to state commission proceedings. *Id.* Congress, therefore, would have had no reason to assume that the APA's requirements concerning burdens of proof would apply absent an express congressional statement to the contrary. The absence of language suggesting "an intent to mandate a different rule," Opp. Br. at 16, means nothing.

The USTA's opposition wrongly implies that the Eighth Circuit considered the empirical judgments cited by the FCC in support of its rule and rejected those judgments as arbitrary. Opp. Br. at 17 ("the Eighth Circuit was correct to discount the FCC's analysis"). But the Eighth Circuit did not even mention, must less evaluate, the reasons behind the FCC's decision to allocate the burden as it did. Pet. App. 30a-32a. It saw no need to do so in light of its erroneous conclusion that the Act clearly assigned the burden of proof.

In any event, the USTA's bald assertion that carriers requesting interconnection have "possession of much of the relevant information," Opp. Br. at 17, does not explain why the FCC's conclusion on the empirical question is not deserving of deference. The USTA does not refute that incumbent rural carriers have exclusive possession of the detailed list of items in GCI's petition, or that such items would be relevant to a termination decision. *See* GCI Pet. at 10-11. Nor does the USTA offer any support for its suggestion that the FCC is required in its rulemaking

proceeding to provide a detailed explication of the types of information possessed by the rural incumbents that are not publicly available or subject to discovery. (Opp. Br. at 17.) *Cf. FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 814 (1978) ("complete factual support in the record for the Commission's judgment or prediction is not possible or required; 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency'"); *Pacific States Box and Basket Co. v. White*, 296 U.S. 176, 186 (1935) (no findings of fact required to support administrative policy judgment where agency action is not in the nature of a judgment directed at an individual concern). At bottom, the USTA quibbles with the merits of the FCC's empirical judgment, and thereby seeks to strip the agency with the special competence to make such policy decisions of the authority delegated to it by Congress to do so.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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